STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 247658 Oakland Circuit Court
TERAN STERLING GRIFFIN, Defendant-Appellant.	LC No. 02-187046-FC

Before: Zahra, P.J., White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89. He appeals as of right. We affirm.

I. Basic Facts

Defendant's conviction arises from the October 13, 2002, attempted armed robbery of a Subway restaurant located in Southfield. Antonia Patterson and defendant entered the restaurant, hooded jackets drawn and both walked into the men's restroom. Employees immediately found the men suspicious, likely because the men were both hooded and because the men together entered and remained in the men's restroom, which had only one stall. Before defendant had even ordered, one employee had called the police, and another employee had pushed a panic button alerting the police to the potential robbery.

When defendant did order, he did not pay, but "just stood there, fiddling in his pockets." Patterson joined defendant at the counter, the men looked at each other, and then left the restaurant. One to two minutes later, the men came back into the restaurant and walked directly to the counter. Defendant asked Patterson if he was going to give him ninety-three cents toward the total. The men again "kind of looked at each other," and Patterson pulled out a gun and demanded the employee give him the money from the register. Notwithstanding the gun pointed at her, the employee fled the restaurant and the other employee followed. Much of the attempted robbery was captured on the restaurant's surveillance camera (videotape of the robbery).

Southfield police officer Dimicio Davis was on patrol when he was dispatched to investigate suspicious persons in the Subway restaurant. He drove to the restaurant, parked, and as he walked up to the door, defendant and Patterson were leaving at a hurried pace. Davis asked to talk with them, but they fled in different directions. Davis called in the descriptions of the two

men and then began to search the area. Another Southfield police officer apprehended defendant two to three blocks from the restaurant, and Davis apprehended Patterson about a block from where defendant was arrested.

Defendant testified at trial that he was in the restaurant to eat after being dropped off by two other men. Defendant stated that Patterson was treating, and he did not know that Patterson had no money and had a gun. Defendant admitted he was using the restroom while Patterson washed his hands. Defendant also admitted that he went into the restroom a second time to fix his hair. Defendant explained that he did not go to the counter right away because he had not decided what to eat and that he had left at one point because he was not sure if he was going to eat at Subway. Defendant denied knowledge of Patterson's intention to rob the restaurant. Defendant claims he froze when Patterson pulled the gun, and ran because he panicked.

II. Sufficiency of the Evidence

A. Standard of Review

This Court reviews a challenge to the sufficiency of the evidence to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the prosecution proved all of the essential elements of the crime beyond a reasonable doubt. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003).

B. Analysis

Defendant argues there is insufficient evidence to support his conviction for aiding and abetting Patterson's assault with intent to rob while armed. "'The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991); MCL 750.89.

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). To support a finding that a defendant aided and abetted a crime, the prosecutor must show:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Id*. at 757-758.]

Here, the prosecution presented sufficient evidence for a rational jury to conclude that defendant aided and abetted Patterson's robbery of the restaurant. Although defendant contends that the evidence presented only establishes that he was present during the robbery, there is substantial evidence showing his participation.

> An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Carines, supra* at 758.]

Defendant testified that he and Patterson knew each other, and they arrived together at the restaurant both sporting drawn hoods that concealed their faces. Inside the restaurant, they acted suspicious. Mena Moulty believed the men so suspicious she stopped eating and walked to the back of the restaurant to tell Nicole Stowers that the men were going to rob the restaurant. Before ordering, the men together twice entered and exited the restaurant's restroom that only had a single stall. Indeed, after the men exited the restroom the second time, Danielle Legette pressed a "panic button," alerting police. When defendant did finally order he did not pay. He stood nervously at the counter until he and Patterson left the restaurant. One to minutes later, the men came back inside and walked directly to the cash register where Patterson drew a gun and demanded money. The photographs taken of defendant when the gun was drawn permit a rational jury to conclude that defendant expected Patterson to rob the restaurant. In addition, after the failed robbery, defendant and Patterson contemporaneously turned and fled the restaurant. Finally, defendant ignored Officer Davis' request to talk, and rather than seek security from a police officer, he fled. Considering the above, a rational jury could conclude beyond a reasonable doubt that defendant was a willing participant of the attempted robbery. Therefore, sufficient evidence was presented to establish defendant's guilt as an aider and abettor.

III. Video Evidence

A. Standard of Review

The record does not reflect an objection to the presentation of the videotape of the robbery or the manner in which it was presented, and therefore, this claim is not preserved for review. Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764.

B. Analysis

Defendant argues he was deprived of due process when the prosecutor repeatedly played, including once in slow motion, the videotape of the robbery taken from the restaurant's video surveillance camera. Defendant complains that the videotape of the robbery was unduly cumulative and that playing it in slow motion falsely impressed upon the jury that defendant had time to consider whether to participate in the robbery or leave.

The videotape of the robbery tends to establish defendant's participation in the crime, and is undeniably relevant. MRE 401. However, MRE 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Even if the videotape of the robbery was shown more than twice, it was not a needless presentation of cumulative evidence. Defendant claimed he did not know that Patterson would rob the restaurant. The videotape of the robbery objectively depicted defendant's behavior and allowed the jury to determine if he was telling the truth.

Moreover, it would have been obvious to the jury that the videotape of the robbery was played slower than real time. Indeed, defense counsel argued that the robbery occurred much faster in actuality, and stated in closing argument that:

> And you see all these pictures and we looked at the video, it's not – that video, the gun was out for two or three seconds, not as long as—it makes it look longer in here, but that is in slow motion. The lady said—agreed with me that the gun was out only a second or two.

Thus, defense counsel argued to the jury that the prosecution showed the videotape of the robbery in slow motion to falsely impress upon the jury that defendant had more time to consider whether to participate in the robbery or leave. Therefore, defendant has failed to establish error, and reversal is not required.

3. Evidence of Defendant's Flight

A. Standard of Review

The record does not reflect a timely objection to evidence of defendant's flight, and therefore, this claim is not preserved for review. Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines, supra*.

B. Analysis

Defendant argues evidence of his flight was improperly admitted because it is not relevant. However:

> An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Carines, supra* at 758.]

Here, defendant placed his state at mind at issue by denying knowledge of Patterson's intent to rob the restaurant. Further, evidence of defendant's arrest was relevant because of testimony that he denied knowledge of the robbery, though he later admitted to being at the robbery. Therefore, evidence of defendant's flight was relevant and properly admitted.

Moreover, defendant testified in detail about his flight in an attempt to explain to the jury that he was not involved in the attempted robbery. He explained that he ran because he panicked and that he was non-compliant with the arresting officer because she assaulted him. "A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then

argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Thus, defendant's assertion is without merit.

4. Prosecutorial Misconduct

A. Standard of Review

A claim of prosecutorial misconduct is preserved by timely objection. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, there was no objection. Unpreserved issues are reviewed for plain error which affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002), citing *Carines*, *supra*.

B. Analysis

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rice (On Remand)*, 235 Mich App. 429, 435; 597 NW2d 843 (1999).

A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *Stanaway*, *supra* at 686. However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues the prosecutor's summation referred to events that were not supported by the record. Specifically, defendant cites the following excerpt from the prosecutor's summation:

> ". . . he just got done telling you he's got to give you reasons why he went into the restroom. He can't tell you, well, I went the restroom because we're in there going, "Come on, man. You do it." "No, you do it." "Come on, it's your gun, you do it" You're fifteen, they'll go easier on you, you do it." "Come on, you can do it, you can do this."

The prosecutor's theory was that defendant and Patterson were in the restroom together giving each other encouragement to commit the crime. This theory is based on expert testimony that younger criminals often work in pairs to encourage each other to commit the offense. Here, the prosecutor's comments attempt to explain why defendant and Patterson were twice together in a single stall restroom. Further, given defendant's testimony that he was in the restroom fixing his hair, the prosecutor was entitled to dispute this testimony because of evidence that defendant exited the restroom wearing a hood. The prosecutor fairly challenged defendant's testimony that he fixing his hair in the restroom, and was also entitled to argue that defendant and Patterson were in the restroom preparing to commit a robbery. There is no prosecutorial misconduct.

5. Ineffective Assistance of Counsel

Defendant last argues that defense counsel's failure to raise the above alleged evidentiary errors constituted ineffective assistance of counsel.

A. Standard of Review

A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, there was no evidentiary hearing or motion for new trial and, therefore, this Court will consider defense counsel's mistakes only to the extent they are apparent on the record. *Id*.

B. Analysis

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Given our conclusions, *supra*, rejecting defendant's claims of error, defendant cannot establish a different outcome reasonably would have resulted. *Carbin*, *supra*. Therefore, defendant cannot establish ineffective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot